

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

BART BOKANOSKI	:	CIVIL ACTION NO.
ROBERT DIZINNO, and	:	3:15-cv-00021-JCH
JEREMY ANDERSON,	:	
on behalf of themselves and all	:	
others similarly situated,	:	
	:	
PLAINTIFFS,	:	
	:	
v.	:	
	:	
LEPAGE BAKERIES PARK ST., LLC,	:	
C.K. SALES CO., LLC,	:	
	:	
DEFENDANTS.	:	FEBRUARY 5, 2015

**ANSWER AND AFFIRMATIVE DEFENSES OF LEPAGE BAKERIES
PARK STREET, LLC AND CK SALES CO., LLC**

COMES NOW Defendants Lepage Bakeries Park St., LLC (“Lepage”) and CK Sales Co., LLC (“CK Sales”)¹ (collectively “Defendants” unless otherwise specified), by their undersigned attorney(s), and hereby file their Answer to Plaintiffs’ Complaint, and state:

Introduction

1. Defendants admit that Plaintiffs purport to bring this action challenging Defendants alleged misclassification of them as independent contractors on behalf of themselves and a group of “similarly situated” current and former distributors who have worked for Defendants in the State of Connecticut and seek remedies for statutory and common law violations arising from this alleged misclassification. Defendants deny that Plaintiffs or those individuals Plaintiffs seek to represent had a contractual relationship with Lepage and further

¹ The correct spelling is Lepage Bakeries Park St., LLC instead of LePage Bakeries Park St., LLC and CK Sales Co., LLC instead of C.K. Sales Co., LLC.

deny that any “similarly situated” distributors exist, that class treatment is appropriate, or that Plaintiffs have any viable claims under Connecticut law against Defendants or are otherwise entitled to any remedies they seek. Defendants deny all remaining allegations contained in Paragraph 1 of Plaintiffs’ Complaint.

Parties

2. Defendants admit that, upon information and belief, Plaintiff Bart Bokanoski is an adult resident of Southbury, Connecticut and a citizen of Connecticut. Defendants also admit that since on or about November 4, 2013, Bokanoski, as an independent contractor distributor and through his independent corporation, has sold and delivered certain baked goods to customers in his territory in Connecticut. Defendants deny the remaining allegations contained in Paragraph 2 of Plaintiffs’ Complaint.

3. Defendants admit that, upon information and belief, Plaintiff Robert DiZinno is an adult resident of Oakville, Connecticut and a citizen of Connecticut. Defendants also admit that since on or about October 21, 2013, DiZinno, as an independent contractor distributor and through his corporation, has sold and delivered certain baked goods to customers in his territory in Connecticut. Defendants deny the remaining allegations contained in Paragraph 3 of Plaintiffs’ Complaint.

4. Defendants admit that, upon information and belief, Plaintiff Jeremy Anderson is an adult resident of Bristol, Connecticut and a citizen of Connecticut. Defendants also admit that since on or about October 21, 2013, Anderson, as an independent contractor distributor and through his corporation, has sold and delivered certain baked goods to customers in his territory in Connecticut. Defendants deny the remaining allegations contained in Paragraph 4 of Plaintiffs’ Complaint.

5. Defendants admit that the above-named Plaintiffs purport to bring this action on behalf of themselves and all similarly situated individuals but deny that any similarly situated individuals exist or that class treatment is appropriate here.

6. Defendants admit that CK Sales is a Limited Liability Company formed in Delaware and that CK Sales contracts with independent contractor distributors who conduct business through distribution centers in Connecticut, among other states. Defendants deny the remaining allegations contained in Paragraph 6 of the Complaint.

7. Defendants admit that Lepage is a Limited Liability Company formed in Maine and that it, through contracts with other entities and otherwise, performs certain business in Connecticut. Defendants deny the remaining allegations contained in Paragraph 7 of the Complaint.

Jurisdiction and Venue

8. Defendants admit that based on the causes of action alleged by Plaintiffs, the Court has original jurisdiction over this matter pursuant to 28 U.S.C. §§ 1332(a) and (d) based on the diversity of the parties and the amounts Plaintiffs claim are in controversy with regard to one or more of the named Plaintiff's claims. Defendants deny, however, that Plaintiffs or those individuals they seek to represent have any viable claims against Defendants or are entitled to any of the relief they seek from Defendants.

9. Defendants admit that venue is appropriate in this forum pursuant to 28 U.S.C. § 1391(a) and (c) because CK Sales, through its contracts with independent contractor distributors, does business in Connecticut and, as such, is subject to personal jurisdiction in this District. Defendants deny the remaining allegations contained in Paragraph 9 of the Complaint.

10. Defendants admit that the business of Lepage includes, in part, manufacturing baked goods under brand or other names such as Country Kitchen and Wonder Bread. Defendants deny the remaining allegations contained in Paragraph 10 of the Complaint.

11. Defendants admit that CK Sales contracted with close to 40 independent contractor distributors, through their independently-established corporations, to sell and distribute various products in the State of Connecticut, and that such distributors are also responsible for properly stocking shelves to increase sales, among others. Defendants deny the remaining allegations contained in Paragraph 11 of the Complaint.

12. Defendants admit that some individuals, employed through third-party staffing firms as employee route sales associates, perform services for Defendant Lepage and may receive the benefits and protections associated with an employment relationship, such as protection under laws governing workers' compensation, unemployment discrimination, unemployment benefits, employment discrimination and workplace safety. Defendants deny the remaining allegations contained in Paragraph 12 of the Complaint.

13. Defendants admit that some others, such as Plaintiffs Bokanoski, DiZinno and Anderson, are independent contractor distributors who have contracted with CK Sales through their own independently-established corporations and that they are often referred to as Independent Distributors (collectively "Distributors"). Defendants deny the remaining allegations contained in Paragraph 13 of the Complaint.

14. Defendants admit that prior to October 2013, Plaintiffs performed work for Lepage while employed by a third-party staffing agency and that in or about September of 2013, they were offered the opportunity to purchase distribution rights to a defined territory (or territories) and, if they wanted to take advantage of this opportunity, would allegedly have to

sign a Distributor Agreement and would perform their work as independent contractors.

Defendants deny the remaining allegations contained in Paragraph 14 of the Complaint.

15. Defendants admit that Distributors sell and distribute certain baked products to customers and that employee route sales associates may deliver products to certain customers. Defendants lack sufficient knowledge or information regarding the hours worked by the named Plaintiffs and therefore deny the same. Defendants deny the remaining allegations contained in Paragraph 15 of the Complaint.

16. Defendants admit that CK Sales treats Plaintiffs as independent contractors who, as such, are not entitled to fringe benefits, expense reimbursement, or certain other protections under federal or state law. Defendants admit that the third-party staffing firms that employ route sales associates pay payroll taxes for the services performed by those employee route sales associates and that Defendants do not pay such payroll taxes for Distributors. Defendants deny the remaining allegations contained in Paragraph 16 of the Complaint.

17. Defendants lack sufficient knowledge or information regarding whether the named Plaintiffs frequently earned less on a weekly basis while distributors than they did as route sales associate employees. Defendants further admit that Plaintiffs and those individuals they seek to represent are generally responsible for their own business expenses. Defendants deny the remaining allegations contained in Paragraph 17 of the Complaint.

18. Defendants admit that Defendant CK Sales entered into a Distributor Agreement with Plaintiffs and other independent contractor distributors they seek to represent but denies the remaining allegations contained in Paragraph 18 of the Complaint.

19. Defendants admit that Defendant CK Sales only contracts with distributors who operate their businesses through an S- or C-corporation but deny the remaining allegations contained in Paragraph 19 of the Complaint.

20. Defendants admit that they draft the contracts and do not typically negotiate material terms of the Distributor Agreement with Plaintiffs and other distributors. Defendants also admit that the Distributor Agreement classifies distributors as independent contractors. Defendants deny the remaining allegations contained in Paragraph 20 of the Complaint.

21. Defendants admit that Plaintiffs and other distributors who contract with CK Sales purchase distribution rights to sell and distribute products to customers in a defined territory. Defendants deny the remaining allegations contained in Paragraph 21 of the Complaint, including that Plaintiffs or those individuals they seek to represent have any viable claims against Defendants under Conn. Gen. Stat. § 31-73.

22. Defendants admit that Defendant CK Sales pays various business expenses on behalf of Plaintiffs and other distributors and withholds amounts Defendants paid on the distributors' behalf from their settlement. Defendants deny that it pays Plaintiffs or those individuals Plaintiffs seek to represent "wages" or that Plaintiffs or those individuals they seek to represent have any viable claims against Defendants under Conn. Gen. Stat. § 31-71(e). Defendants deny the remaining allegations contained in Paragraph 22 of the Complaint.

23. Defendants deny the allegations contained in Paragraph 23 of the Complaint.

24. Defendants deny the allegations contained in Paragraph 24 of the Complaint.

25. Defendants admit that distributors are engaged in the sale and distribution of baked goods but deny the remaining allegations contained in Paragraph 25 of the Complaint.

26. Defendants admit that distributors are restricted from engaging in certain activities that could be considered competitive but deny the remaining allegations contained in Paragraph 26 of the Complaint.

27. Defendants deny the allegations contained in Paragraph 27 of the Complaint.

Class Action Allegations

28. Defendants admit that Plaintiffs purport to bring this class action lawsuit on behalf of all Distributors who obtain or deliver certain products in Connecticut and who are or have been misclassified as independent contractors but deny that class action treatment is appropriate or that Plaintiffs or those individuals they seek to represent have any viable claims against Defendants. Defendants deny the remaining allegations contained in Paragraph 28 of the Complaint.

29. Defendants deny the allegations contained in Paragraph 29 of the Complaint.

30. Defendants deny the allegations contained in Paragraph 30 of the Complaint.

31. Defendants admit that Plaintiffs' counsel will fairly and adequately represent the interests of the class but deny the remaining allegations contained in Paragraph 31 of the Complaint.

COUNT I

CONNECTICUT INDEPENDENT CONTRACTOR LAW

32. Defendants hereby incorporate and reallege all responses set forth above as if fully incorporated herein.

33. Defendants deny the allegations contained in Paragraph 33 of the Complaint.

34. Defendants admit that Plaintiffs purport to assert this claim pursuant to Conn. Gen. Stat. § 31-72 but deny that Plaintiffs or those individuals Plaintiffs seek to represent have

any viable claims thereunder. Defendants deny the remaining allegations contained in Paragraph 34 of the Complaint.

COUNT II

ILLEGAL WITHHOLDING OF WAGES

35. Defendants hereby incorporate and reallege all responses set forth above as if fully incorporated herein.

36. Defendants deny the allegations contained in Paragraph 36 of the Complaint and further deny that class action treatment of these claims is appropriate.

37. Defendants admit that Plaintiffs purport to bring this claim pursuant to Conn. Gen. Stat. § 31-72 but deny that Plaintiffs or those they seek to represent have any viable claims against Defendants thereunder.

COUNT III

ILLEGAL REFUND OF WAGES FOR FURNISHING EMPLOYMENT

38. Defendants hereby incorporate and reallege all responses set forth above as if fully incorporated herein.

39. Defendants deny the allegations contained in Paragraph 39 of the Complaint, including that Plaintiffs have any viable claims against Defendants.

40. Defendants admit that Plaintiffs purport to bring this claim pursuant to Conn. Gen. Stat. § 31-72 but deny that Plaintiffs or those they seek to represent have any viable claims against Defendants thereunder.

COUNT IV

UNJUST ENRICHMENT

41. Defendants deny the allegations contained in Paragraph 41 of the Complaint and further deny that class treatment of these claims is appropriate.

PRAYER FOR RELIEF

Defendants deny that Plaintiffs or those they seek to represent are entitled to any of the relief set forth in their Prayer for Relief, including in subparagraphs (a)-(g).

Defendants deny each and every allegation contained in Plaintiff's Complaint not expressly admitted above.

AFFIRMATIVE AND OTHER DEFENSES

As for separate defenses to the Complaint, and without conceding that Defendants bear the burden of proof or persuasion as to any of them, except as required by applicable law with respect to the defense asserted, Defendants state as follows:

FIRST DEFENSE

Plaintiffs' claims against Lepage are barred because Lepage never had a contractual or employment relationship with Plaintiffs or those individuals Plaintiffs purport to represent, nor is Lepage a real party in interest.

SECOND DEFENSE

Plaintiffs' Complaint fails to state a claim upon which relief can be granted because neither Plaintiffs nor those individuals Plaintiffs seek to represent are "employees" under Connecticut law. Rather, Plaintiffs and those individuals Plaintiffs seek to represent, through their own independently-established corporations, entered into independent distributor agreements, which expressly provide that they are independent contractors. Further, Defendants

did not exercise the requisite degree of control in contract or in fact for the Plaintiffs or those individuals Plaintiffs seek to represent to be employees, and Plaintiffs and those individuals they seek to represent perform(ed) services outside the company's place of business and the usual course of business. Finally, Plaintiffs and those individuals they seek to represent are and were at all relevant times engaged in an independently established trade, business or occupation because they operate their own independent businesses, in which they own an equity interest that can be sold, use their own individual initiatives to increase their equity, can advertise to the public, perform services for others, and hire their own helpers or employees, among others.

THIRD DEFENSE

Plaintiffs' Complaint, in whole or in part, fails to state a claim upon which relief can be granted because Plaintiffs and those individuals Plaintiffs seek to represent were self-employed, performed services for Defendants through their own independent corporations, and were not paid "wages" for services rendered under Conn. Gen. Stat. §§ 31-71- 31-73. Rather, Plaintiffs and those individuals they seek to represent earned a profit margin (*i.e.* the difference between the price they purchased the products from CK Sales for, less the price they sold the products to their customers for, less business expenses). This profit margin was paid to their corporations directly.

FOURTH DEFENSE

Assuming, *arguendo*, Plaintiffs and those individuals they seek to represent are employees, which is expressly denied, and assuming, *arguendo*, Plaintiffs and those individuals they seek to represent were paid "wages," which is expressly denied, Plaintiffs' claims, and the claims of those individuals Plaintiffs seek to represent, for violations of Conn. Gen. Stat. § 31-73 are barred to the extent there is no private cause of action under that statute. Alternatively,

Plaintiffs' claims and the claims of those individuals they seek to represent are barred to the extent any such deductions did not constitute a refund of wages or to the extent the right to any such "wages" did not vest until any alleged deductions, if any, were taken.

FIFTH DEFENSE

Assuming, *arguendo*, Plaintiffs and those individuals they seek to represent are/were employees within the meaning of applicable law, which is expressly denied, and to the extent Plaintiffs and those individuals they seek to represent are/were paid "wages," which is expressly denied, Plaintiffs' claims and the claims of those individuals they seek to represent for unlawful deductions are barred, in whole or in part, to the extent any such amounts withheld do not constitute deductions under applicable law, to the extent Defendants were empowered to make any such deductions by state law, and/or to the extent any such deductions were knowingly and voluntarily authorized by Plaintiffs or those individuals they seek to represent in their Distributor Agreements, Settlement Statement Authorization, or otherwise.

SIXTH DEFENSE

Plaintiffs' claims, and the claims of those individuals they seek to represent, are barred, at least in part, by the contractual limitations of damages provisions to which they agreed in their Distributor Agreements.

SEVENTH DEFENSE

Plaintiffs' claims, and the claims of those individuals they seek to represent, are barred, at least in part, by the doctrine of waiver in that they failed to notify CK Sales of such claims within the time frames specified in their Distributor Agreements.

EIGHTH DEFENSE

Plaintiffs' claims, and the claims of those they individuals seek to represent, are barred to the full extent of the operation of the equitable doctrine of laches, estoppel, payment, unclean hands, *in pari delicto*, accord and satisfaction, and/or payment or set off to the extent they have been fully compensated for any owed "wages" and, by accepting the payments made to them, have effectuated an accord and satisfaction of their claims.

NINTH DEFENSE

Plaintiffs' claims for benefits, and the benefit claims of those individuals they seek to represent, are barred by the doctrine of waiver in that they expressly waived in their Distributor Agreements their right to participate in any benefits plans offered by CK Sales to employees. Plaintiffs' benefits claims, and the benefit claims of those individuals they seek to represent, are also barred because they are expressly excluded from the coverage of such benefits.

TENTH DEFENSE

Plaintiffs' unjust enrichment claims and the unjust enrichment claims of those individuals Plaintiffs seek to represent are barred because Plaintiffs and those individuals they seek to represent operate under valid contracts with CK Sales, which clearly delineate the parties' respective rights and obligations and method of compensation, and which provide adequate remedies.

ELEVENTH DEFENSE

Plaintiffs' unjust enrichment claims and the unjust enrichment claims of those individuals Plaintiffs seek to represent are barred to the extent they were/are adequately compensated for any benefit Defendants received, or, alternatively, because Defendants did not receive a benefit for

which they were obligated to compensate Plaintiffs or those individuals Plaintiffs seek to represent.

TWELFTH DEFENSE

Plaintiffs' claims and the claims of those individuals they seek to represent are barred by the doctrines of release and waiver to the extent any such individual executed a valid waiver and release of such claims in exchange for consideration.

THIRTEENTH DEFENSE

Plaintiffs' claims, and the claims of those individuals Plaintiffs seek to represent, are barred because they lack standing to assert such claims to the extent they are not covered by the statutes sought to be invoked. Further, Plaintiffs' claims on behalf of any former distributors are barred because such individuals lack standing with respect to their claims for declaratory and injunctive relief.

FOURTEENTH DEFENSE

Plaintiffs' claims and the claims of those individuals they seek to represent are barred, at least in part, by the doctrine of judicial estoppel to the extent they have filed for bankruptcy and not disclosed the claims asserted herein as assets of the bankruptcy estate in the bankruptcy petition or attached schedules.

FIFTEENTH DEFENSE

Plaintiffs' claims and the claims of those individuals they seek to represent are barred, at least in part, because they knowingly submitted to and acquiesced in the obligations and relationship set forth in their Distributor Agreements, from which they have received and accepted financial benefits.

SIXTEENTH DEFENSE

Plaintiffs' requests for relief that are equitable in nature must be dismissed because Plaintiffs and those individuals they seek to represent have adequate remedies at law.

SEVENTEENTH DEFENSE

Plaintiffs have failed to plead facts with sufficient particularity to support an award of liquidated damages or, alternatively, any award of liquidated damages is barred because Defendants acted in good faith, with reasonable basis and an honest intention to comply with the law at all times.

EIGHTEENTH DEFENSE

Plaintiffs are inadequate representatives of the allegedly similarly situated group of persons whom they purport to represent, the existence of which is expressly denied, and certain of Plaintiffs' interests are in conflict with the interests of some or all of the members of the individuals Plaintiffs purport to represent.

NINETEENTH DEFENSE

The alleged claims of Plaintiffs are neither common nor typical of each other's or of those, if any, of the class Plaintiffs seeks to represent, the existence of which is expressly denied, because Plaintiffs and the individuals they seek to represent worked in different warehouses, under different sales managers with different day-to-day practices, for different customers with different customer-service requirements, if any, and under different circumstances, among others, during the relevant time period, all of which, among others, would need to be examined, by Plaintiff, to adjudicate their claims and which is not subject to common proof.

TWENTIETH DEFENSE

Some or all of the purported claims in Plaintiffs' Complaint are barred because the

purported class members are not so numerous that joinder of each member would be impracticable.

TWENTY-FIRST DEFENSE

Some or all Plaintiffs' claims are barred because Plaintiffs have not and cannot show that class action treatment is superior to other available methods for the fair and efficient adjudication of this controversy.

TWENTY-SECOND DEFENSE

Certification of a class action under these circumstances would violate the parties' rights under the United States Constitution.

TWENTY-THIRD DEFENSE

The types of claims Plaintiffs have alleged on their own behalf and on behalf of other similarly situated employees, the existence of whom Defendants expressly deny, are claims in which individual questions predominate and for which class treatment is not appropriate.

TWENTY-FOURTH DEFENSE

Plaintiffs' claims fail to meet the mandatory requirements of Fed. R. Civ. Pro. 23(a) or (b).

TWENTY-FIFTH DEFENSE

Plaintiffs' claims are barred to the extent that they are not simple, concise or direct as required by Rule 8(d).

TWENTY-SIXTH DEFENSE

If any damages have been sustained by Plaintiffs, or by any of those individuals Plaintiffs seek to represent, which is expressly denied, Defendants are entitled under the equitable doctrine of setoff and recoupment to offset all obligations owed by Plaintiffs and those individuals

Plaintiffs seek to represent to Defendants against any judgment that may be entered against Defendants.

TWENTY-SEVENTH DEFENSE

Plaintiffs' claims, and the claims of those individuals Plaintiffs seek to represent, are preempted, in whole or in part, by federal law, in particular the Federal Aviation Administration Authorization Act of 1994 ("FAAAA") and the Employee Retirement Income Security Act ("ERISA").

TWENTY-EIGHTH DEFENSE

Some or all of Plaintiffs' claims, and the claims of those individuals Plaintiffs seek to represent, are barred to the extent they have failed to exhaust administrative remedies under the employee benefits plans at issue and/or under applicable administrative rules.

TWENTY-NINTH DEFENSE

Plaintiffs' claims cannot be properly joined with the claims of any individuals they seek to represent because their claims are individualized and fact-specific and do not arise out of a common set of facts as those claims they purport to assert on behalf of the individuals they seek to represent. More specifically, Plaintiffs and those they seek to represent worked in different warehouses, under different sales managers with different day-to-day practices, for different customers with different customer-service requirements, if any, and under different circumstances, among others, during the relevant time period, all of which, among others, must be examined by individual to adjudicate their claims, and which is not subject to common proof.

THIRTIETH DEFENSE

Plaintiffs are not entitled to injunctive relief because the allegations in the Complaint do not meet the legal requirements for such relief.

THIRTY-FIRST DEFENSE

Some or all of the purported claims in Plaintiffs' Complaint are barred because neither Defendant has acted or refused to act on any grounds generally applicable to the purported class members and therefore final injunctive relief or corresponding declaratory relief with respect to the purported class members is not appropriate.

THIRTY-SECOND DEFENSE

Plaintiffs' claims are barred to the extent they arose outside of the applicable statute of limitations.

Defendants assert the Affirmative and Other Defenses set forth herein with respect to all individuals who do not opt-out of any Rule 23 class, to the extent one is certified, which Defendants deny is appropriate.

Defendants will rely upon all proper defenses lawfully available that may be disclosed by evidence and reserves the right to amend this Answer to state such other affirmative and additional defenses and/or to otherwise supplement this Answer upon discovery of facts or evidence rendering such action appropriate.

DEFENDANTS,
LEPAGE BAKERIES PARK ST., LLC and
C.K. SALES CO., LLC

By /s/ John G. Stretton
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CERTIFICATE OF SERVICE

I, hereby certify that I have this day electronically filed the foregoing **ANSWER AND AFFIRMATIVE DEFENSES OF LEPAGE BAKERIES PARK STREET, LLC AND CK SALES CO., LLC** with the Clerk of Court using the CM/ECF system, which will send notification of the filing to the following person:

Dated this the 5th day of February, 2015.

/s/John G. Stretton _____

John G. Stretton